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NO. 98-489

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

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MILLICENT CLESI BRODTMANN, WIFE OF
EDWOOD S. BRODTMANN, ET AL
Petitioners

versus

CLAUDE W. DUKE AND KREMER MARINE, INC.,
ONAN CORPORATION and CUMMINS ENGINE CO.
Respondents

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On Petition for Writ of Certiorari to the
Louisiana Supreme Court

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# RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Are punitive damages available in a *Moragne* death action brought by survivors of a *Calhoun*-type non-seafarer[1] who died in state territorial waters?

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[1]"Non-seafarer" is meant in the context used by this Court in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 n.2 (1996) as persons who are neither seamen covered by the Jones Act, 46 U.S.C. §688 (1988 ed.) nor longshore workers covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901, et seq.

## RULE 29.6 STATEMENT

Subsidiaries and Affiliates

Respondent Onan Corporation is a wholly owned subsidiary of Cummins Engine Company, Inc. Onan Corporation has no nonwholly owned subsidiaries.

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## BRIEF IN OPPOSITION
## TO PETITION FOR WRIT OF CERTIORARI

## STATEMENT OF THE CASE

On October 10/11, 1989, decedent, Edwood S. Brodtmann and three friends were passengers aboard the recreational vessel, M/V PEGGY D, for an overnight pleasure fishing voyage. Brodtmann died aboard the M/V PEGGY D as it was anchored in Louisiana state waters. The coroner declared that the cause of Brodtmann's death was carbon monoxide asphyxiation.

On October 8, 1990, petitioners, Millicent Clesi Brodtmann and her three adult children (Brodtmann), filed their suit for wrongful death and for punitive damages. Respondent, Onan Corporation (Onan), manufactured the twenty-two year-old 6.5 kilowatt marine generator aboard the PEGGY D. Brodtmann's suit claimed that liability for the death of their loved one rested with Onan. Brodtmann argued that Onan's product was flawed by a design defect and/or inadequate warnings associated with the galvanized steel exhaust pipe nipple that connected the generator exhaust elbow assembly to the manifold. More germane to this petition, Brodtmann argued that Onan was guilty of gross, wanton and willful misconduct sufficient to warrant the imposition of punitive damages under the general maritime law.

In pretrial motions, Onan requested the trial court to rule that the general maritime law governed the Brodtmann claims and to therefore dismiss all claims for nonpecuniary damages, including Brodtmann's punitive damages claim. The trial court denied the motion.

The trial court proceeded with a bench trial over a ten-week period in 1994. Over Onan's objection, the court admitted evidence of other incidents involving Onan marine generators. As a result, Onan faced trial upon multiple claims spanning a period of two decades rather than upon the *Brodtmann* casualty alone. The trial record is thus an amalgamation of evidence directly bearing on the *Brodtmann* casualty, and evidence of five prior lawsuits and one verbal incident report to Onan, including testimony from five accident victims, four experts, twenty depositions of witnesses with no personal knowledge of the *Brodtmann* casualty, and scores of pleadings and discovery relating to the prior incidents.

On May 2, 1995, the trial court rendered Judgment awarding compensatory damages in favor of Brodtmann and against Onan. Under the direction of *Bridgett v. Odeco, Inc.*, 646 So.2d 1249, 1253-54 (La. App. 4th Cir. 1994), *writ den.*, 651 So.2d 840 (La. 1995), the trial court dismissed Brodtmann's claim for punitive damages.

Brodtmann filed a Motion for New Trial, asserting that their decedent's status as a non-seafarer distinguished this case from *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317 (1990) and its progeny, and thus made available to them punitive damages under general maritime law. The trial court denied the motion for new trial on May 16, 1995.

Brodtmann again challenged the punitive damages judgment in an appeal filed with the intermediate Louisiana appellate court. Brodtmann once more argued that their decedent's non-seafarer status exempted them from the special solicitude and uniformity principles of the general maritime law, most recently stated in *Miles* and its progeny, and thus made available their recovery of general maritime law punitive

damages. In considering the merits of the punitive damages appeal, the appellate court first acknowledged that punitive damages are not available under Louisiana substantive law based on the fact herein. The court then proceeded to analyze the issue under the general maritime law.

The appellate court explored its previous *en banc* decision in *Bridgett v. Odeco, Inc.*, *supra*, which counseled that punitive damages liability is foreclosed under the general maritime law without regard to questions of status. The Court of Appeal also examined this Court's benchmark decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), noting that the overwhelming weight of the jurisprudence, including decisions of the Fifth and Sixth Circuit Courts of Appeals, support the application of *Miles'* uniformity principles to bar punitive damages liability under general maritime law. The court flatly rejected the decision of the First Circuit Court of Appeals, in *CEH, Inc. v. F/V SEAFARER*, F.3d 694 (1st Cir. 1995), which permitted a general maritime law punitive damages claim, finding it unsound:

> While we recognize that punitive damages have long been available under the general maritime law, we are also cognizant of the changes in this area of the law over the last several years. Although plaintiffs rely on a decision from the First Circuit [*CEH*] which refused to apply *Miles* to a claim for punitive damages brought under the general maritime law, we find the overwhelming weight of the jurisprudence in this jurisdiction to support this Court's decision in *Bridgett*.

*Brodtmann,* 708 So.2d at 454. On February 11, 1989, the Louisiana intermediate appellate court issued its Opinion rejecting the Brodtmann arguments. *Brodtmann v. Duke, et als.*, 708 So.2d 447 (La. App. 4th Cir. 1998).

Brodtmann for a third time challenged the punitive damages judgment in a writ of certiorari and/or review filed with the Louisiana Supreme Court. Brodtmann again urged that their decedent's status as a non-seafarer made the teachings of *Miles* and its progeny irrelevant to their general maritime law punitive damages claim. On April 24, 1998, the Louisiana Supreme Court denied the writ of review and/or certiorari. *Brodtmann v. Duke, et als.*, ___ So.2d ___ (La. 1998).

There is no dispute in the present case that punitive damages are not available under Louisiana substantive law based on the facts herein.[2] And as detailed below, there is no cause for this Court's review of the punitive damages contention, which has been rejected by not only the state courts here involved, but also by courts nationwide in the wake of *Miles*.

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[2]Punitive damages may not be recovered in any action under Louisiana law unless expressly authorized by statute. *International Harvester Credit Corp. v. Seale*, 518 So.2d 1039, 1041 (La.1988). At the time of the *Brodtmann* casualty, punitive damages were allowed by Louisiana statutes only under two scenarios. They were recoverable when injuries were incurred as a result of wanton or reckless disregard for public safety in the storage, handling or transportation of hazardous or toxic substances (former LSA-C.C. art. 2315.3 (repealed)) and when injuries were caused by a wanton or reckless disregard for the rights and safety of others by a defendant whose intoxication while operating a motor vehicle causes injury (LSA-C.C. art. 2315.4). The causes of action alleged against Onan did not state a claim for the recovery of punitive damages under either Article 2315.3 or 2315.4.

## REASONS FOR DENYING THE WRIT

Review on a writ of certiorari is not a matter of right, but of judicial discretion. Rule 10 of the Rules of the Supreme Court of the United States. A petition for a writ of certiorari will be granted only for compelling reasons. Rule 10. This Petition and the issues presented therein satisfy none of the criteria for the Supreme Court to grant certiorari.

Since this Court's decision in *Miles v. Apex Marine, Corp.*, 498 U.S. 19 (1990), nearly every court facing the issue of punitive damages recovery under general maritime law has worked toward its elimination, thus fostering the uniform nationwide body of maritime law this Court envisioned in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). Using the federal maritime statutes as a guide, the national jurisprudence has moved consistently toward a body of law which disavows the existence of a federal maritime punitive damages remedy, regardless of whether the accident occurs within territorial waters or on the high seas, and regardless of whether the victim is a maritime worker or recreational boater.

The lower state courts in this case ruled that punitive damages are unavailable as a matter of general maritime law, and are equally unavailable under Louisiana law given the facts of this case. This decision is consistent with the uniformity concerns of *Moragne* and *Miles*, and with a series of later decisions from the First, Second, Fifth, Sixth, Ninth and Eleventh Circuits and with those from the vast majority of federal district courts nationwide. The decision below also follows the defining principles of the general maritime law -- special solicitude and uniformity.

*Miles* precludes recovery of punitive damages in causes of action created by the judiciary as well as by statute. *Miles* eliminates the availability of punitive damages for fatal injuries to seamen. Uniformity of an ordered system of maritime substantive law and recovery dictates that punitive damages should also be barred in personal injury actions arising from non-fatal injuries to seamen. Special solicitude further dictates that because punitive damages are denied to seafarers, they must likewise be denied in actions involving death or injury of non-seafarers. In fact, it would be incongruous to permit the recovery of punitive damages in actions arising from the death or injury of non-seafarers, but to deny the same remedy to seafarers. Uniformity also demands that recovery under the judicially created maritime law injury and death actions be no greater than recovery under the maritime statutes.[3]

If reversed, this decision will sound the death knell to the fundamental concepts of maritime law -- uniformity and special solicitude -- this Court has spent decades creating. For these reasons and those which appear below, petitioners' claim that the courts below erred in denying them punitive damages warrants no further review.

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[3]*See* Thomas M. DiBiagio, *Fostering Uniform Substantive Law and Recovery – The Demise of Punitive Damages in Admiralty and Maritime Personal Injury and Death Claims*, 25 U. Balt. L. Rev. 1 (1995).

## ARGUMENT

### A. Punitive damages are unavailable in post-*Miles* general maritime law wrongful death actions.

Two objectives -- special solicitude and uniformity -- have shaped the face of maritime personal injury and death law. *Trueheart v. Blandon*, 672 F.Supp. 929, 936 (E.D. La. 1987) (emphasis added) (citing *Moragne*, 398 U.S. at 386-87).

#### 1. *The maritime law wrongful death remedy in coastal waters.*

The maritime wrongful death saga begins with the decision of this Court in *The Harrisburg*, 119 U.S. 199 (1886), where a seaman was killed when his ship collided with another vessel in coastal waters off Massachusetts. His heirs brought suit against the offending vessel for wrongful death, relying on the general maritime law. No federal maritime statutes were in force at that time, and many or most of the states followed the English common law rule precluding recovery for wrongful death under any circumstance. This Court rejected the plaintiff's claim reasoning that, absent a statute, there was no action for wrongful death at common law and, therefore, there was no such action in the maritime setting.

Undeterred by the harshness of *The Harrisburg*, the courts sought alternative avenues of relief wherever possible. As states began enacting wrongful death statutes,[4] admiralty courts

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[4]For deaths which occurred on the high seas, recovery could only be pursued under a limited number of state wrongful death statutes. *The Hamilton*, 207 U.S. 398 (1907). Because very few state statutes were interpreted to apply on the high seas, most deaths on the high seas did not

tempered the harshness *The Harrisburg* of by utilizing state wrongful death remedies.[5] But the infusion of state laws further complicated maritime tort litigation. Some state statutes permitted recovery for maritime deaths; others did not. Therefore, as the maritime death evolved, differing substantive laws would apply and different remedies would be awarded, based solely on the fortuitous location of the injury.

Aware of these inequities, Congress took steps toward effectuating a uniform system of maritime recovery by enacting two statutes affording recovery for wrongful death. In 1920, Congress passed the Death on the High Seas Act (DOHSA), which created a wrongful death remedy for deaths more than three miles from shore.[6] In that same year, Congress also passed the Jones Act, which provides a wrongful death claim to the survivors of seamen killed in the course of their employment, whether on the high seas or in coastal waters.[7] Congress also enacted, in 1927, the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), which granted death benefits to

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permit a cause of action. *Moragne*, 398 U.S. at 393 n.10.

[5]Years before *The Harrisburg*, this Court side-stepped the problem of whether the general maritime law itself would recognize a wrongful death action, preferring instead to permit recovery pursuant to state statute. *Steamboat Co. v. Chase*, 83 U.S. 522 (1873). *But see Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917) (precluding application of a New York state workmen's compensation statute to a longshoreman on board a vessel docked in navigable waters as an unconstitutional invasion of federal interests).

[6]46 U.S.C. §§761-768 (1988 ed.).

[7]46 U.S.C. §688 (1988 ed.).

longshoremen and harbor workers killed in the course of their employment.[8]

Although these statutes made significant inroads toward maritime uniformity, they did not apply, on their face, to the death of non-seafarers in territorial waters. Brodtmann construe Congressional silence in the coastal waters as preserving to non-seafarers greater remedies than those afforded to seafarers. That Brodtmann misunderstand and grossly underestimate Congressional inaction is evident from this Court's unanimous opinion in *Moragne v. States Lines Marines, Inc.*, 398 U.S. 375 (1970).[9]

By the late 1960s, nonuniform rules of recovery permeated federal maritime law, especially in the wrongful death context. Fatal accidents on the high seas had an adequate federal

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[8]33 U.S.C. §§901, et seq. (1988 ed.). In 1972, Congress amended the Act by permitting a statutory cause of action for negligence against a vessel, including a remedy for wrongful death. 33 U.S.C. §905(b).

[9]In *Moragne*, this Court interpreted Congressional silence in coastal waters as symbolic of Congress' approval of the adequacy of state law remedies to effectuate the substantive duties imposed by general maritime law. 398 U.S. at 397-98. This Court had earlier affirmed this practice in *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921), concluding that extending state wrongful death statutes to fatal accidents in coastal waters was compatible with substantive maritime policies: "The subject is maritime and local in character and the specified modification of or supplement to the rule applied in admiralty courts . . . will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations." *Id.* at 242. It reaffirmed this practice in *The Tungus v. Skovgaard*, 358 U.S. 588 (1959), wherein a unanimous Court approved the application of state law to the wrongful death of a non-seafarer in territorial waters, which would have otherwise been without remedy under *The Harrisburg*. *See also Hess v. United States*, 361 U.S. 314 (1960) (same).

remedy, while the same accidents nearer shore might yield more generous awards, or none at all, depending on the law of the nearest state. The potential existed for as many different remedies (or no remedy at all) as there would be states addressing deaths on their territorial waters. *Id.* at 395-96.

This Court finally dealt a death blow to *The Harrisburg* in *Moragne, supra*, which involved an unseaworthiness claim asserted by the widow of a longshoreman killed in Florida's territorial waters. Because the law of Florida did not provide for a wrongful death action based on unseaworthiness, the widow's claim was barred by the rule of *The Harrisburg*. Justice Harlan, writing for a unanimous Court, overruled *The Harrisburg* and held that a general maritime wrongful death action would "assure uniform vindication of federal policies." 398 U.S. at 402. By aligning the general maritime law with the policies embodied in the DOHSA, the Jones Act, and state statutory schemes, the *Moragne* Court for the first time furthered the twin aims of general maritime law, special solicitude and uniformity.

Justice Harlan understood that the function of "special solicitude" had shifted from that which counseled *The Sea Gull*'s[10] invocation of the "humane and liberal" character of the maritime law. In the words of *Moragne*, "[a] development of major significance ha[d] intervened," to wit, the enactment of a federal maritime personal injury and wrongful death statutory scheme. 398 U.S. at 388. The Jones Act, DOHSA, and LHWCA (coupled with state wrongful death statutes) protected many, if not all, of those previously left without remedy under the general maritime law. The solicitude extended in *Moragne* was measured, reaching only as far as uniformity permits by keeping the general maritime law true to policies embodied in

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[10] 21 F.Cas. 909, 910 (C.C.D. Md. 1865) (No. 12,578).

federal legislation.[11] *Moragne* confirmed that admiralty courts can update the general maritime law to the extent it lags behind federal policy judgments. As a result, the facts of *Moragne* (longshoreman killed in state waters) compelled the conclusion that wrongful death recovery under the general maritime law was a proper extension of the policy according special solicitude to those who make a living upon the sea.

Justice Harlan's brief discussion of special solicitude foreshadowed the main thrust of *Moragne*: creating a general maritime wrongful death action that would restore uniformity to federal maritime law. The central feature of *Moragne* is that by creating a wrongful death action under the general maritime law, the Court restored a uniform rule that furthered "federal

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[11] *See* U. Colella, *The Proper Role for Special Solicitude in the General Maritime Law*, 79 Tul. L. Rev. 227, 261-64 (1995). With two exceptions, this Court has remained faithful to this view of special solicitude. *See Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573 (1974) (holding that beneficiaries of longshoremen killed in state territorial waters can recover loss of society damages, even though seamen and those injured on the high seas cannot); *American Export lines, Inc. v. Alvez*, 446 U.S. 274 (1980) (extending *Gaudet* to longshoremen injured in state territorial waters).

*Gaudet* was decided by the barest of majorities and had soon been eroded to the point where its continued vitality was cast in doubt. *See, e.g., Sistrunk v. Circle Bar Drilling Co.*, 770 F.2d 455 (5th Cir. 1985), *cert. den.*, 475 U.S. 1019 (1986); *Truehart v. Blandon*, 672 F.Supp. 929 (E.D. La. 1987). This Court eliminated all doubt about *Gaudet* in *Miles*, wherein it held that the survivors of a seaman killed in territorial waters could not supplement their Jones Act recovery by obtaining loss of society damages under *Gaudet*. In so ruling, the Court stated, "[t]he holding of *Gaudet* applies only in territorial waters and applies only to longshoremen." *Miles*, 498 U.S. at 31. As the Sixth Circuit recently stated in *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1459 (6th Cir. 1993), "[*Gaudet*] has therefore been condemned to a kind of legal limbo: limited to its facts, inapplicable on its facts, yet not overruled."

policies." 398 U.S. at 401. The Court achieved this goal by aligning the general maritime law with the policies embedded in DOHSA and the Jones Act. The Court insisted that the general maritime law be uniform with federal policy regarding wrongful death, which also happened to coincide with the policy of all fifty states. This action created bottom-line uniformity in maritime law – even in the absence of state wrongful death remedies, all beneficiaries had a wrongful death remedy available under maritime law.[12] *Moragne* also rejected a maritime recovery scheme that would fortuitously single out for special compensation any victim of wrongful conduct. The *Moragne* Court thus provided lower courts with a workable definition of uniformity as it relates to maritime personal injury and death actions under the general maritime law.

The uniformity sought by *Moragne* was emphasized in this Court's unanimous opinion in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), which also subscribes to the proper view of special solicitude. In *Miles,* the nondependents of a seaman brought a negligence claim under the Jones Act and a *Moragne* claim based on the vessel's unseaworthiness. In addition to pecuniary damages available under the Jones Act, the complaint asked for non-pecuniary damages under *Moragne,* as supplemented by *Gaudet.* The Court denied the broader recovery, emphasizing once more that the vindication of maritime policies demands uniformity of maritime remedies.[13] The *Miles* Court reasoned that its decision restored "a uniform rule applicable to all actions for the wrongful death of a seaman,

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[12]*See* Robert Force, *Post-Calhoun Remedies for Wrongful Death and Injury in Maritime Cases: Uniformity, Whither Goest Thou?*, 21 Tul. Mar. L.J. 7, 37 (1996).

[13]498 U.S. at 32.

whether under DOHSA, the Jones Act, or general maritime law." 498 U.S. at 33.

In *Miles*, this Court once more insisted that the general maritime law should be uniform with federal policy regarding wrongful death. The Court harmonized the Jones Act and general maritime law with DOHSA, which expressly disallows recovery for nonpecuniary damages.[14] In barring recovery of nonpecuniary damages, *Miles* circumscribed the power of the admiralty judge to expand remedies under the general maritime law in a way that undermines congressional policy judgments. 498 U.S. at 32-33. The *Miles* Court explained:

> [A]n admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and admiralty courts must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. These statutes both direct and delimit our actions.

*Id.* at 27, 31-32. *Miles*, then, heralds a move toward greater uniformity between maritime law and its statutory analogs.[15]

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[14] *See* 46 U.S.C. §762.

[15] In *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978), this Court declined to allow the DOHSA remedy to be supplemented by a general maritime/*Moragne* recovery in order to award damages on the high seas for loss of society. Similarly, in *Off-Shore Logistics, Inc. v. Tallentire*,

The uniformity concern which informed *Miles* is most apparent in the Court's devotion to the legal history of the maritime death action, with particular attention to the rationale and objectives of the Court in *Moragne*. The *Miles* Court noted the statutory attempts to "achieve uniformity," the anomalies created by unanticipated jurisprudential developments, and the government's plea, as amicus, "to eliminate these inconsistencies and render maritime wrongful death law uniform." *Miles*, 498 U.S. at 26. The Court "described *Moragne* at length because it exemplifies the fundamental principles that guide our decision in this case. . . ." *id.* at 27, and specifically concluded that "*Moragne* intended to create a general maritime wrongful death action applicable beyond the situation of longshoremen." *Id.* at 30. The Court further held that, in the context of *Miles*, *Moragne* extended the DOHSA wrongful death remedy to territorial waters, *Miles*, 498 U.S. at 29, and that such extension "will further, rather than hinder, 'uniformity in the exercise of maritime jurisdiction." *Id.* at 29 (citing *Moragne*, 398 U.S. at 396 n.12).

Although this Court in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996) approved the application of certain state wrongful death and survival statutes in fatal accidents occurring in coastal waters involving non-seafarers, it is wrong to assume that *Calhoun* abandons the time-honored maritime objectives of uniformity and special solicitude. To the contrary, *Calhoun* repeatedly urged that "[p]ermissible state regulation . . . must be consistent with federal maritime principles and policies," 116 S.Ct. at 626 n.13 (citing *Romero v. International Terminal Operating Co.*, 79 S.Ct. 468, 480-81 (1959)), such that "state law

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477 U.S. 207, 32 (1986), the Court rejected an attempt to award those same damages in a DOHSA action by supplementation with a state statute which would have allowed recovery for loss of society.

must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system." *Calhoun,* 116 S.Ct. at 626 n.8 (quoting *Romero,* 79 S.Ct. at 480-81).

It is evident in *Calhoun* that this Court, while intent on protecting the existing state interests (fatal collision between jet ski and pleasure boat in Puerto Rico's coastal waters), also meant to preserve bedrock maritime principles recognized in *Southern Pacific Company v. Jensen,* 37 S.Ct. 524, 529 (1917), wherein this Court held that state law must yield if it "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." Indeed, since the birth of the *Jensen* doctrine very early in this century, the goal of uniformity in maritime law has been a driving force. *Calhoun,* by emphasizing this principle yet again, has affirmed its continued vitality.

### 2. *Punitive damages under general maritime law.*

Before 1990, maritime courts widely assumed that punitive damages were available under general maritime law. This Court first recognized the recoverability of punitive damages in *The Amiable Nancy,* 16 U.S. (3 Wheat.) 546 (1818) (Story, J.), when it recounted the outrageous conduct of the officers and crew of the American privateer Amiable Nancy toward a commandeered vessel. However, it was not until 1859, in *Gallagher v. The Yankee,* 9 F.Cas. 1091 (N.D. Cal.), *aff'd,* 30 F.Cas. 781 (C.C.N.D.Cal. 1859), that an appellate court reviewed the amount of a punitive damages award in a maritime case. There, punitive damages were awarded against a ship's master who illegally transported the plaintiff against his will to the Hawaiian Islands, in compliance with a San Francisco vigilante committee's sentence of banishment.

Despite the assumed availability of maritime punitive damages, this Court has *never* affirmed an award of punitive damages in a maritime case.[16] This Court's decisions in *Moragne* and *Miles* have laid the foundation for the elimination of punitive damages in all maritime law actions.

Respondents have shown that in *Moragne* and *Miles,* this Court demanded uniformity between the general maritime law and congressional policy judgments when the two collided in territorial waters. Although *Miles* did not involve or discuss punitive damages,[17] a number of the lower federal courts have utilized the "analytical framework" of the *Miles* opinion and held punitive damages are not available in a seaman's action under DOHSA, the Jones Act, or the general maritime doctrine of unseaworthiness.[18] Other courts, also invoking the *Miles*

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[16]*See Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1508 n.11 (5th Cir. 1995), *cert. den.*, 116 S.Ct. 706 (1996).

[17]This Court mentioned the term "punitive damages" only to indicate that the lower courts in the case at hand had rejected such damages on the facts. 498 U.S. at 22-23.

[18]*Horsley v. Mobil Oil Corp.*, 15 F.3d 200 (1st Cir. 1994); *Miller v. American President Lines, Ltd.*, 989 F.2d 1450 (6th Cir.), *cert. den.*, 510 U.S. 915 (1993); *Clancy v. Mobil Oil Corp.*, 906 F. Supp. 42 (D. Mass. 1995); *Bell v. Zapata Haynie Corp.*, 855 F. Supp. 152, 153 (W.D.La. 1994) ("In *Miles* . . . the Supreme Court held that non-pecuniary damage are not recoverable under General Maritime Law or the Jones Act. Punitive damages, by their nature, are non-pecuniary."); *Ledet v. Power Offshore Servs., Inc.*, 1994 WL 150805 (E.D. La. 1994); *Guillory v. C.F. Bean Corp.*, 1994 WL 150738 (E.D. La. 1994); *Poret v. Noble Drilling Corp.*, 1994 WL 150725 (E.D. La. 1994); *Sullivan v. Crewboats, Inc.*, 1993 WL 541855 (E.D. La. 1993); *Tate v. Zapata Gulf Marine Constr.*, 1993 WL 346190 (E.D. La. 1993); *Dopson v. Wilrig (U.S.A.), Inc.*, 1993 WL 192145 (E.D. La. 1993); *Knighton v. Tidex Marine, Inc.*, 1993 WL 53005 (E.D. La. 1993); *Jackson v. Unisea, Inc.*, 824 F. Supp. 895 (D. Alaska 1992); *Ortega v. Oceantrawl, Inc.*, 822 F. Supp. 621 (D.

rationale, have held that the general maritime law precludes any action for punitive damages on behalf of a seaman, whether against an employer who has wrongfully refused to provide

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Alaska 1992); *Anderson v. Texaco, Inc.*, 797 F. Supp. 531 (E.D. La. 1992); *In re Cleveland Tankers, Inc.*, 791 F. Supp. 679 (E.D. Mich. 1992); *In re Waterman Steamship Corp.*, 780 F. Supp. 1093 (E.D. La. 1992); *Howard v. Atlantic Pac. Mar. Corp.*, 1992 WL 55487 (E.D. La. 1992); *Donaghey v. Ocean Drilling & Exploration Co.*, 1992 AMC 528 (E.D. La. 1991); *In Re Aleutian Enter., Ltd.*, 777 F. Supp. 793 (W.D. Wash. 1991); *Haltom v. Lykes Bros. Steamship Co.*, 771 F. Supp. 179 (E.D. Tex. 1991); *Matter of Mardoc*, 768 F. Supp. 595 (E.D. Mich. 1991); *Rollins v. Peterson Builders, Inc.*, 761 F. Supp. 943 (D.R.I. 1991); *Stoufflet v. Apex Towing Co.*, 1991 WL 194759 (E.D. La. 1991); *Rowan Cos., Inc. v. Badeaux*, 1991 WL 175541 (E.D. La. 1991); *Brumfield v. Zapata Gulf Mar. Corp.*, 1991 WL 174818 (E.D.La. 1991); *Odeco, Inc. v. Cornish*, 1991 WL 160400 (E.D. La. 1991); *LeBleu v. Mud Control Equip. Corp.*, 1991 WL 110406 (E.D. La. 1991); *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294 (Tex. 1993); *Graves v. Businelle Towing Corp.*, 673 So. 2d 311 (La. App. 1996); *Public Adm'rs v. Frota Oceanica Brasileira, S.A.*, 635 N.Y.S. 2d 606 (N.Y. App. 1995); *Maritime Overseas Corp. v. Ellis*, 886 S.W.2d 780 (Tex. App. 1994); *Theriot v. McDermott, Inc.*, 611 So. 2d 129 (La. App. 1992), *writ den.*, 615 So. 2d 342 (La. 1993); *Sky Cruises, Ltd. v. Andersen*, 592 So. 2d 756 (Fla. App.), *cert. den.*, 506 U.S. 975 (1992).

maintenance and cure[19] or against a non-employer defendant.[20] Still other courts have relied upon *Miles* to preclude all punitive damages actions under maritime law.[21]

Brodtmann complain that the general maritime law is permeated by nonuniform rules, and therefore seeking uniformity in general maritime remedies is arbitrary. Their argument is persuasive. Although the general maritime law is nonuniform in some areas, this alone is not sufficient reason to create or perpetuate nonuniform rules of recovery in other areas of the general maritime law. Indeed, Brodtmann do not contest the proposition that uniformity remains a goal of the general

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[19]*Guevara, supra*; *Glynn v. Roy Al Boat Mgt. Corp.*, 57 F.3d 1495 (9th Cir. 1995), *cert. den.*, 116 S. Ct. 708 (1996); *Boyd v. Cinmar of Glouster, Inc.*, 919 F.Supp. 208 (E.D. Va. 1996); *Long v. F/V Melanie*, 918 F.Supp. 323 (W.D. Wash. 1996); *Hollinger v. Kirby Tankships, Inc.*, 910 F.Supp. 571 (S.D. Ala. 1996); *Carolina Clipper, Inc. v. Axe*, 902 F.Supp. 680 (E.D. Va. 1995); *LaVoie v. Kualoa Ranch and Activity Club, Inc.*, 797 F.Supp. 827 (D. Haw. 1992); *Maritime Overseas Corp. v. Waiters*, 917 S.W.2d 17 (Tex. 1996); *Stone v. International Mar. Carriers, Inc.*, 918 P.2d 551 (Alaska 1996); *Milstead v. Diamond M Offshore, Inc.*, 663 So.2d 137 (La. App. 1995), *rev'd in part on other grounds*, 676 So.2d 89 (La. 1996); *Gray v. Texaco, Inc.*, 610 So.2d 1090 (La. App. 1992), *writs den.*, 616 So.2d 686, 687 (La. 1993).

[20]*Boykin v. Bergesen D.Y. A/S*, 822 F.Supp. 324 (E.D. Va. 1993); *Bridgett v. Odeco, Inc.*, 646 So. 2d 1249, 1253-54 (La. App. 4th Cir. 1994), *writ den.*, 651 So. 2d 840 (La. 1995).

[21]*Cochran v. A/H Battery Assocs.*, 909 F.Supp. 911 (S.D.N.Y. 1995); *Bardwell v. George G. Sharp, Inc.*, 1995 WL 517120 (E.D. La. 1995); *Frantz v. Brunswick Corp.*, 866 F.Supp. 527, 532 (S.D. Ala. 1994) (non-seafarer in territorial waters; court struck recreational boater's general maritime law punitive damages claim based upon *Miles*, and so interpreting *Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1094 (2d Cir. 1993), *cert. den.*, 510 U.S. 1114 (1994)); *Earhart v. Chevron U.S.A. Inc.*, 852 F.Supp. 515 (E.D. La. 1993).

maritime law. This Court's decisions in *Gaudet* and *Alvez* arguably support Brodtmann's position, as do some lower court decisions.[22] *See, e.g., CEH v. F/V SEAFARER*, 70 F.3d 694 (1st Cir. 1995) (affirming an award of punitive damages against the owner and captain of a trawler vessel that willfully destroyed

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[22]The reported *post-Miles* decisions supporting punitive damages in territorial waters wrongful death and survival actions all pre-date *Guevara* and *Glynn*. *Powers v. Bayliner Marine Corp.*, 855 F.Supp. 199, 202 (W.D. Mich. 1994), *aff'd without treating the point*, 83 F.3d 789 (6th Cir. 1996); *Newhouse v. United States*, 844 F.Supp. 1389, 1394 (D. Nev. 1994); *In re Morehead Marine*, 844 F.Supp. 1193, 1196-97 (S.D. Ohio 1994); *Strawder v. Zapata Haynie Corp.*, 649 So. 2d 554, 561 (La. App. 1994). The *Newhouse* court confined its approval of punitive damages to "general maritime survival action[s]." 844 F. Supp. at 1394. The *Powers*, *Morehead*, and *Strawder* courts seemed not to draw a distinction between wrongful death and survival actions.

The remaining *post-Miles* non-seafarer cases favorable to punitive liability all involve property damage. Only one of these decisions even mentions *Miles*. The ones that do not mention *Miles* are *Gamma-10 Plastics, Inc. v. American President Lines, Ltd.*, 32 F.3d 1244, 1257 (8th Cir. 1994), *cert. den.*, 115 S.Ct. 1270 (1995) (holding that respecting transactions governed by the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§1300-1315, cargo interests can pursue the carrier for punitive damages when the loss or damages results from a tort that is independent of the breach of the contract of carriage); *Jones v. Compagnie Generale Maritime*, 882 F.Supp. 1079, 1083-85 (S.D. Ga. 1995) (agreeing with *Gamma-10* court that COGSA does not preclude the shipper's pursuit of punitive damages but insisting that it takes not merely an independent tort but "criminally culpable behavior" to generate such a cause of action); *Leather's Best Int'l, Inc. v. MV Lloyd Sergipe*, 760 F.Supp. 301, 313 (S.D.N.Y. 1991) (dictum to same effect as *Gamma-10*); *Hudson River Cruises, Inc. v. Bridgeport Drydock Corp.*, 892 F.Supp. 380, 386 (D. Conn. 1994) (dictum that punitive damages would lie for tortious property damage caused by drydock company engaged to repair vessel).

plaintiff's lobster traps and, in doing so, rejecting *Miles*).[23] However, neither *Gaudet, Alvez, CEH,* or similarly-reasoned lower court decisions are consistent with the clear language of *Moragne,* which states that uniformity relates to "federal policies" and that those policies receive their most potent expression in federal legislation. It is for this reason that the lower Louisiana appellate court decried *CEH* unsound.[24]

The federal policies gleaned from the maritime recovery statutes and the principles of special solicitude have encouraged the First, Second, Fifth, Sixth, Ninth and Eleventh Circuits to acknowledge their duty to apply the rationale of *Miles* beyond its facts, just as *Miles* applied *Moragne* beyond its facts. They have applied *Miles* to personal injury and death claims;[25] to punitive

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[23]Significantly, *CEH* accepted the characterization of *Miles* as a case involving "nonpecuniary relief" and of punitive damages as a form of "nonpecuniary relief." *See CEH,* 70 F.3d 700 (stating that *Miles* "den[ied] recovery for loss of society, a form of nonpecuniary relief"); *Id.* at 701 (stating that the court could find "no basis under *Miles* for barring nonpecuniary relief here).

[24] *See Brodtmann vs. Duke, et als.*, 708 So.2d at 454.

[25]*In re Amtrack Sunset Ltd. Train Crash in Bayou Canot,* 121 F.3d 1421 (11th Cir. 1997); *Horsley, supra* (there is no right to recover loss of society in general maritime law unseaworthiness action involving non-fatal injury); *Smith v. Trinidad Corp.*, 992 F.2d 996 (9th Cir. 1993) (*per curiam*) (same).

damages and loss of society damages;[26] and to nonseamen and seamen alike.[27]

The *en banc* Fifth Circuit in *Guevara, supra,* spoke directly of *Miles'* impact on the substantive content of the general maritime law. The issue before the *Guevara* court concerned an injured seaman's claim for punitive damages as a result of his employer's willful and callous refusal to pay maintenance and cure. The *Guevara* court reversed years of prior case law in the Fifth Circuit by holding that punitive damages were no longer recoverable when an employer willfully and callously refuses to pay maintenance and cure to an injured seaman.[28] *See also, Glynn v. Roy Al Boat Management Corp,* 57

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[26]*Guevara,* 59 F.3d at 1513 (unanimous *en banc* Fifth Circuit held that in light of *Miles,* "punitive damages are no longer available in cases of willful nonpayment of maintenance and cure under the general maritime law"); *Glynn,* 57 F.3d at 1512 (concluding that limiting recovery in maintenance and cure claims to non-pecuniary damages is consistent with *Miles*); *Horsley, supra* (punitive damages are unavailable in unseaworthiness claims after *Miles*); *Miller, supra* (punitive damages are not available under general maritime law).

[27]*Chan v. Society Expeditions, Inc.,* 39 F.3d 1398 (9th Cir. 1994) (dependents of injured non-seafarer have no loss of consortium claim under general maritime law), *cert. den.,* 115 S.Ct. 1314 (1995); *Preston v. Frantz,* 11 F.3d 357 (2d Cir. 1993) (survivors of non-seafarer who died in helicopter crash on the high seas could not recover punitive damages under general maritime law), *cert. den.,* 512 U.S. 1279, 115 S.Ct. 31 (1994) *Wahlstrom v. Kawasaki Heavy Industries, Ltd.,* 4 F.3d 1084, 1094 (2d Cir. 1993) (parents of non-seafarer cannot pursue punitive damages claim under general maritime law), *cert. den.,* 510 U.S. 1114 (1994)). *See also, Shield v. Bayliner Marine Corp.,* 822 D. Conn. 1993) (refusing to draw a distinction between seamen and passengers).

[28]The Fifth Circuit had previously held in *Holmes v. J. Ray McDermott & Co.,* 734 F.2d 110 (5th Cir. 1984) that an award of punitive damages under the general maritime law may be obtained when an employer

F.3d 1495, 1501-5 (9th Cir.1995) (reaching same conclusion as *Guevara* and holding, among other things, that precluding punitive damages is consistent with *Miles*).[29]

The *Guevara* court reasoned that *Miles*' call for uniformity demands that punitive damages no longer be available under the general maritime law of maintenance and cure. The *en banc* Fifth Circuit also explained that because of *Miles*, its opinion in *Dyer v. Merry Shipping Co.*, 650 So.2d 622 (5th Cir. 1981) was no longer sound and had been effectively overruled. *Merry Shipping* was the first case to provide for punitive damages under the general maritime law in the Fifth Circuit and has furnished the legal foundation for all punitive damages claims in maritime cases ever since.

*Merry Shipping* involved the death of a seaman and his widow's wrongful death action based upon the Jones Act and the unseaworthiness doctrine of the general maritime law. The primary issue before the Fifth Circuit concerned the availability

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willfully and callously refuses to pay maintenance and cure to an injured seaman. However, upon rehearing in *Guevara*, the court noted that significant developments in the law of admiralty since the *Holmes* decision required a rethinking of its position. *See Guevara*, 59 F.3d at 1498.

[29]A number of federal district court and state court decisions have followed the lead of *Guevara* and *Glynn*. *Boyd v. Cinmar of Gloucester, Inc.*, 919 F. Supp. 208 (E.D. Va. 1996); *Long v. F/V Melanie*, 918 F. Supp. 323 (W.D. Wash. 1996); *Hollinger v. Kirby Tankships, Inc.*, 910 F. Supp. 571 (S.D. Ala. 1996); *Carolina Clipper, Inc. v. Axe*, 902 F. Supp. 680, 684 (E.D. Va. 1995) (citing unreported decision in *Flagship Mar. Adjusters, Inc. v. Cruz Hernandez*, E.D. Va. No. 2:95cv105); *Maritime Overseas Corp. v. Waiters*, 917 S.W.2d 17 (Tex. 1996); *Stone v. International Marine Carriers, Inc.*, 918 P.2d 551 (Alaska 1996); *Milstead v. Diamond M. Offshore, Inc.*, 663 So. 2d 137, 152 (La. App.), *rev'd in part on other grounds*, 676 So. 2d 89 (La. 1996).

of punitive damages under the federal statute and judge-made general maritime law. In answering the question affirmatively under the general maritime law, *Merry Shipping* disregarded the congressional policy judgments in the Jones Act. In fact, *Merry Shipping* passed over the Jones Act entirely, stating that "[t]he district court may well be correct that punitive damages may not be recovered in this Circuit under the Jones Act, although we need not decide the issue at this time." 650 F.2d at 626. The *Merry Shipping* holding relied upon one key proposition: "It does not follow . . . that if punitive damages are not allowed under the Jones Act, they should also not be allowed under general maritime law." 650 F.2d at 626. *Miles*, which demands parity between federal policy judgments in the maritime statutes and recovery under the general maritime law, effectively overruled *Merry Shipping*. *Guevara*, 59 F.3d at 1507. With the death of *Merry Shipping*, the legal underpinnings of the punitive damages claims are no longer sound.

*Miles* and *Guevara* are consistent with the concept of full compensation. The decisions allow plaintiffs to be fully compensated by either the Jones Act or DOHSA, and do not permit the general maritime law to provide a more generous remedy than statutory analogs. What *Miles* and *Guevara* do not permit is punitive damages recovery, which would be over and above full compensation. Punitive damages are imposed to punish and deter defendants; thus, they are something separate from and additional to full compensation.[30]

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[30]As a legal term, "pecuniary damages" is used to refer to categories of losses for which compensatory damages are sought that can be measured with reasonable accuracy in terms of money; they are designed to restore "material loss which is susceptible of a pecuniary valuation." *Michigan Cent. R.R. v. Vreeland*, 227 U.S. 59 (1913)). *See also Black's Law Dictionary* 392 (6th ed. 1990). The post-*Miles* cases speak with singular unanimity in concluding that punitive damages are nonpecuniary. "Punitive damages, on

Even before *Guevara* rejected punitive damages, the Second Circuit, district courts in the Fourth, Fifth and Eleventh Circuits, and state courts in Alabama and Louisiana had all concluded that *Miles* eliminates punitive damages from the general maritime law. These judicial declarations occurred in factual settings which all involved personal injuries or deaths and included maritime products liability suits,[31] *Moragne* actions,[32] collision (or allision) cases,[33] or actions by seamen against non-employers.[34]

After *Guevara*, an ever-increasing number of district courts denied punitive damages in non-seafarer personal injury

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the other hand, do not compensate for a loss, but rather, are imposed to punish and deter by virtue of the gravity of the offense." *Anderson v. Texaco, Inc.*, 797 F.Supp. 531, 534 (E.D. La. 1992) (collecting cases). *See also Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084 (2d Cir. 1993) (acknowledging that punitive damages are nonpecuniary), *cert. den.*, 510 U.S. 1114 (1994); *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1347 (9th Cir. 1987) ("Punitive damages are non-pecuniary . . . ."); *Kopczynski v. The Jacqueline*, 742 F.2d 555, 561 (9th Cir. 1984) ("Punitive damages are nonpecuniary."), *cert. den.*, 471 U.S. 1136 (1985). *See even Merry Shipping*, 650 F.2d at 626 (noting that its previous holding that only pecuniary damages are recoverable under the Jones Act cases doubts upon the availability of punitive damages under the Act).

[31] *Wahlstrom, supra*; *Frantz v. Brunswick Corp.*, 866 F.Supp. 527 (S.D. Ala. 1994).

[32] *Choat v. Kawasaki Motors*, 1994 AMC 2626 (Ala. 1994).

[33] *Earhart v. Chevron U.S.A. Inc.*, 852 F.Supp. 515 (E.D. La. 1993).

[34] *Boykin v. Bergesen D.Y. A/S*, 822 F.Supp. 324 (E.D. Va. 1993); *Bridgett v. Odeco, Inc.*, 646 So.2d 1249 (La. App. 4th Cir. 1994), *writ den.*, 651 So.2d 840 (La. 1994).

actions,[35] reasoning that because *Miles* means seafarers' actions cannot yield punitive damages, other maritime plaintiffs can have no more generous remedies. They have also construed *Miles* as fostering a uniform plan of maritime tort law which Congress and this Court have sought to establish. These cases also stand against punitive liability in death cases in coastal waters.

Brodtmann suggest that the federal statutes that limit recovery, namely DOHSA and the Jones Act, should have no bearing on the remedies available under the general maritime law. This argument forgets that examining analogous, if not controlling maritime statutes, was the central feature of this Court's general maritime law decisions in *Moragne* and *Miles*.[36]

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[35]*O'Hara v. Celebrity Cruises, Inc.*, 979 F.Supp. 254, 255 (S.D.N.Y. 1997) (denying punitive damages to two *non-seafarers* - cruise ship passengers - in general maritime law action against non-employer); *Frazer v. City of New York*, 659 N.Y.S.2d 23 (N.Y.Sup. 1997)(denying punitive damages to *non-seafarers* - passengers on sightseeing boat which struck a bridge - in maritime personal injury action against non-employers); *Cochran v. A/H Battery Associates*, 909 F.Supp. 911, 921-22 (S.D.N.Y. 1995) (a *non-seafarer* - passenger on a ferry which collided with a dock - cannot recover punitive damages under general maritime law against non-employers). *See also Hollinger v. Kirby Tankships, Inc.*, 910 F.Supp. 571, 573 (S.D. Ala. 1996); *Frantz v. Brunswick Corp.*, 866 F.Supp. 527, 532 (S.D. Ala. 1994) (denying punitive damages to *non-seafarer* in maritime products liability action against boat manufacturer, steering system manufacturer and seller)

[36]*See also, Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), wherein the Court declined to permit the general maritime law to supplement DOHSA and provide recovery for nonpecuniary losses like loss of society. The Court saw a "difference between filling a gap left by Congress' [sic] silence and rewriting rules that Congress has affirmatively and specifically enacted." 436 U.S. at 625. When Congress "speak[s] directly" to an issue, courts cannot undermine that judgment through the general maritime law. Id. Because DOHSA explicitly limits damages to pecuniary losses,

Nor is any court constrained from looking to analogous federal statutes and fashioning remedies consistent with those enactments to further special solicitude and uniformity.

Brodtmann also contend that adherence to uniformity runs athwart of special solicitude. In essence, Brodtmann argue that it is "unjust" to deny non-seafarers a remedy (like punitive damages) on the basis that the same remedy is not available to the *most protected class* of potential plaintiffs under maritime law (i.e., seafarers). This *reverses* the special solicitude shown to seafarers. If maritime law does not provide a remedy to those most protected by maritime law, it is hardly unjust to deny that remedy to those *less* in need of maritime law's protections. To the contrary, it would be entirely inequitable to permit a remedy to non-seafarers which is denied to seafarers. As the *Trueheart* Court stated:

> [D]istinguishing other cases on the basis of their involving seamen and seaworthiness claims in order to allow recovery here would not foster admiralty's aim of providing special solicitude to seamen. General maritime law is its most generous to seamen, the wards of admiralty. This Court refuses to find such a distinction relevant in order to craft for nonseamen's survivors a remedy not available to seamen's survivors, to whom admiralty also provide special solicitude.

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*Higginbotham* Court held that DOHSA was the exclusive remedy for deaths occurring on the high seas. *Id.* at 622-26.

*Miles* complements the *Higginbotham* formula by suggesting that when courts have interpreted a remedial statute to preclude certain damages or causes of action, the general maritime law cannot supplement that statute with broader remedies.

*Trueheart,* 672 F.Supp. at 937; *see also, Wahlstrom,* 4 F.3d at 1092; DiBiagio, 25 U. Balt. L. R. 1, 3 (Fall 1995) ("[I]f punitive damages are no longer available in claims arising from the death or injury of a seaman, the traditional ward of maritime law, it would be incongruous to permit the recovery of punitive damages in actions arising from injury or death of a non-seaman.").

*Moragne* found the existing maritime recovery scheme intolerable because "identical breaches of the duty to provide a seaworthy ship, resulting in death, produce[d] liability outside the three-mile limit . . . -- but not within territorial waters of a State whose local statute exclude[d] unseaworthiness claims." 398 U.S. at 395. The *Moragne* Court found "much force" in the argument that different in treatment based on location of the injury could not be supported by any "rational policy," especially since the underlying duty to furnish a seaworthy vessel is a federal one. 398 U.S. at 395-96. Accordingly, because of this anomaly and others, the Court in *Moragne* declined to adhere any longer to "a rule unjustified in reason, which produced different results for breaches of duty in situations that cannot be differentiated in policy." 398 U.S. at 405. Brodtmann have articulated no rational policy for permitting non-seafarers to recover punitive damages in territorial waters, while denying the same remedy to seafarers and to those killed on the high seas. Nor can they do so.

Allowing punitive damages in this *Moragne* death action would dishonor the uniformity and special solicitude objectives by injecting two major inconsistencies into the maritime wrongful death law. First, punitive damages would be available for certain deaths occurring within territorial waters, but not for deaths occurring on the high seas, thus violating the uniformity objective. Second, punitive damages would be forever beyond

the reach of the most protected maritime claimants (seafarers) but available to a lesser protected class (non-seafarers) who fortuitously die in coastal waters, thus violating the objective of special solicitude. This Court should be loathe to reintroduce such inconsistencies into maritime law.

This Court has always acknowledged the special solicitude to those who make a living on the sea. *Moragne, supra,* 398 U.S. at 387. The Court has also applied maritime precepts to non-seafarers injured or killed on or over the seas where the activity is one that would traditionally have been conducted by water craft regardless of the lack of their conscious assumption of the risks of the seas. *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio,* 409 U.S. 249 (1972); *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207 (1986). Because the Court has imposed maritime precepts on non-seafarers, it should strive to make uniform remedies. The uniformity demands of *Moragne* and *Miles* are unquestionably promoted by aligning general maritime recovery with the maritime recovery statutes to deny punitive damages liability in *Moragne* death actions arising from fatal injuries to non-seafarers in territorial waters. A contrary conclusion would turn the principles of uniformity and special solicitude on their heads.

**B. Punitive damages are unwarranted.**

Even assuming *arguendo* that punitive damages are available under the post-*Miles* general maritime law, applicants failed to adduce sufficient admissible evidence to establish liability for punitive damages under the general maritime standard. In order to recover punitive damages in this maritime case, the applicants were required to prove that Onan acted with intentional, willful, reckless, wanton and callous disregard of the

threat to the safety of the consumer -- i.e., in bad faith and with actual malice. *Matter of P&E Boat Rentals, Inc.*, 872 F.2d 642 (5th Cir. 1989); *Morales v. Garijak, Inc.*, 829 F.2d 1355 (5th Cir. 1987); *Harper v. Zapata Offshore Co.*, 741 F.2d 87 (5th Cir. 1984); *Complaint of Merry Shipping, Inc., supra.*[37] The evidence adduced at trial falls far short of this high threshold.

Brodtmann offered volumes of evidence in their attempt to prove that punitive damages are warranted. The bulk of that evidence relates to prior accidents involving other Onan MCCK generators. Even taking all inferences in Brodtmann's favor, such evidence does not support a finding of conscious or deliberate disregard of foreseeable harm. At best, it may support a claim of negligence. However, negligence alone, does not support imposition of punitive damages. *Morales, supra.*

The evidence shows that Onan has always conducted itself in a responsible manner with regards to the safety of its marine generators and their users. First, Onan designed the MCCK 6.5 in compliance with the only standards in existence at that time -- ABYC voluntary compliance standards, which approved galvanized steel as an appropriate metal. Onan's compliance with those standards precludes a rational finding of conscious disregard for consumer safety. Second, although the fact that other incidents occurred may suggest notice of a defect, it does not prove that Onan continued to sell the MCCK genset in "conscious or deliberate disregard" of the consumer's safety. The evidence proves just the contrary; it shows that Onan believed in good faith that its consumer warnings concerning the dangers of carbon monoxide and other exhaust gasses, and its

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[37]Onan's position is, and has been, that these decisions are no longer viable in light of the uniformity principles that have shaped the general maritime law.

recommendations for proper ventilation and regular inspection of generator after every eight (8) hours of operation, as well as U.S. Coast Guard recommendations for more frequent inspections, were reasonable protections for consumers. Although these warnings might not preclude substantive liability findings of product liability, they negate any inference that Onan acted with actual malice in continuing to sell the MCCK genset. In fact, Onan thoroughly investigated all claims filed against it relating to the safety of its MCCK marine generators, determined from these investigations that the galvanized steel exhaust pipe nipple was *not* defective, and reiterated its warnings relating to the proper installation, maintenance, and use of the generator. Third, applicants' brief argues that Onan failed to warn consumers of the product's dangers because in Onan's opinion, the galvanized steel exhaust pipe nipple would last as long as the other component parts of the generator. That such an opinion might have been erroneous does not amount to actual malice supporting the imposition of punitive damages.

In sum, applicants did not present evidence for the factfinder supporting an award of punitive damages.

## CONCLUSION

For all of the foregoing reasons, this case does not merit further review. Accordingly, the judgment should stand and this Petition should be denied.

Respectfully submitted,

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